Mr Justice Swayne

Morrison Law

SUPREME COURT OF THE UNITED STATES.

No. ~~235~~. 151.

LUCIUS H. PRATT, PLAINTIFF IN ERROR,

vs.

HENRY FITZHUGH, DE WITT C. LITTLEJOHN, and ANDREW MILLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF NEW YORK.

GIDEON, Printer, 511 Ninth Street, Washington, D. C.

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GIDEON, Print.

[Writ of Error.]

THE PRESIDENT OF THE UNITED STATES.

To the Honorable the Judge of the Circuit Court of the United States for the Northern District of New York, GREETING:

Because in the record and proceedings, as, also, in the rendition of the judgment in certain proceedings in the said Circuit Court before you, in the matter of the application of Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, for a habeas corpus, to discharge them from the custody of the Sheriff of the County of Oswego, and keeper of the common jail of the said County of Oswego, in the said district, under and by virtue of an execution issued out of the said Circuit Court, in a cause of admiralty and maritime jurisdiction, wherein Lucius H. Pratt was libellant, and the Old Oswego Line claimant, of the propeller Kentucky, was respondent, and the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller were sureties, manifest error hath happened to the great damage of the said Lucius H. Pratt, as by his complaint appears: We being willing that error, if any hath been, should be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, the seventeenth day of October, in the year one thousand eight hundred and sixty.

A. A. BOYCE,
Clerk.

DENNIS BOWEN,
Att'y for L. H. Pratt.

[Citation.]

THE UNITED STATES OF AMERICA,

To Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller; and to A. P. Grant, Esq., their attorney, GREETING:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error

filed in the clerk's office of the Clerk of the Circuit Court of the United States, for the Northern District of New York, wherein Lucius H. Pratt is plaintiff in error, and you, the said Fitzhugh, Littlejohn, and Miller, are defendants in error, to show cause, if any there be, why the judgment rendered in the proceedings in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Nelson, Justice of the Supreme Court of the United States, this seventeenth day of October, in the year one thousand eight hundred and sixty.

S. NELSON.

DENNIS BOWEN,
Att'y for L. H. Pratt,
Plaintiff in Error.

UNITED STATES OF AMERICA,
Northern District of New York,
City of Buffalo, *ss.*

Salmon Shaw, being duly sworn, says: That on the 20th day of October, 1860, at the City of Oswego, in said district, he served the within citation on Henry Fitzhugh, De Witt C. Littlejohn, Andrew Miller, and A. P. Grant, the persons mentioned and described therein, by delivering copies thereof to and leaving the same with each of said individuals personally, and, at the same time, showing to each of them this original. And deponent further says, that he knew the persons so served to be the persons mentioned and described in, and to whom said citation is directed.

SALMON SHAW.

Sworn to before me, October 25th, 1860.

AURELIAN CONKLING,
Commissioner of the U. S.

[1] CIRCUIT COURT OF THE UNITED STATES,
Northern District of New York.

In the matter of the application of HENRY FITZHUGH, DE WITT C. LITTLEJOHN, and ANDREW MILLER, for a habeas corpus, &c.

I, Augustus A. Boyce, Clerk of the Circuit Court of the United States, in and for the Northern District of New York, in the second circuit, having inspected the files and records of my said office, kept by me in the City of Utica, in said district, do find therein [2] an original judgment record, of which the following is a true and correct copy of the whole thereof.

In testimony whereof I have hereunto subscribed my name, and have hereto affixed the seal of the said Court, at my office in Utica, this seventh day of November, in the year of our Lord eighteen hundred and sixty, and of our Independence the eighty-fifth.

AUG. A. BOYCE,
Clerk.

[Petition.]

Of October Term, in the year one thousand eight hundred and fifty-nine.

CIRCUIT COURT OF THE UNITED STATES, Northern District of New York. } *ss.*

[3] Be it remembered, that heretofore and on the twenty-sixth day of August, 1859, at Cooperstown, in the Northern District of New York, Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, by A. P. Grant, their proctor, did present to the Honorable Samuel Nelson, one of the justices of the Supreme Court of the United States, their certain petition for a writ of habeas corpus, duly verified, with certain schedules thereto annexed, of which the following are copies:

To the Hon. Samuel Nelson, a Judge of the Supreme Court of
[4] the United States, and Circuit Judge of the United States for the Second Circuit of the State of New York.

The petition of Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, respectfully showeth, that they are respectively citizens and residents of the City and County of Oswego, and are now prisoners restrained of their liberty in the custody of the sheriff of the said County of Oswego, and were committed to the custody of said
[5] sheriff by the Marshal of the United States for the Northern District of New York, who arrested them by virtue of a process issuing out of the Circuit Court of the United States for the said Northern District of New York, a copy of which is hereto attached, marked schedule "A." Your petitioners are informed, that it is claimed on the part of Lucius H. Pratt, the libellant in the suit in which such process issued, that upon the decree obtained in that suit, your petitioners are liable to be imprisoned, but as your petitioners are informed by their counsel, and believe, they are not liable to be
[6] imprisoned upon such decree, and that no process regularly can issue thereupon which will justify their imprisonment. They were not parties to the suit in which such decree was perfected in any other way or capacity than being sureties upon a bond given by the Old Oswego Line as claimants of the propeller Kentucky, on its arrest upon the libel issued in favor of said libellant in the United States District Court, for the Northern District of New York, which

[7] is the same suit and proceedings particularly set forth in the affidavit hereto annexed and made by your petitioners, and marked as "Schedule C." Your petitioners ask leave to refer to said affidavit, and that the same be taken as a statement of the facts upon which they found their application for a writ of habeas corpus. Your petitioners are advised by counsel, and verily believe, that this imprisonment is illegal, for the reason that they being mere sureties and not parties to said libel suit, they are not liable to be imprisoned [8] upon said decree. Wherefore, your petitioners pray a habeas corpus to discharge them from custody.

Dated Pulaski, August, 1859.

HENRY FITZHUGH,
DE WITT C. LITTLEJOHN,
ANDREW MILLER.

A. P. GRANT,
Proctor.

UNITED STATES,
Northern District of New York. } *ss.*

Personally appeared before me, Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, the petitioners within named, who being by me duly sworn, each on his oath says, that he has read the foregoing petition and knows the contents thereof, and that the contents thereof are true except those things stated to be on infor- [9] mation and belief, and as to those things he believes them to be true; this 18th day of August, 1859.

ROBT. LANSING, Commissioner of the United States Court, for the Northern District of New York, U. S.

[Schedule A.]

UNITED STATES OF AMERICA,
Northern District of New York. }

The President of the United States of America to the Marshal of the Northern District of New York, and to his deputies, greeting:

[L. S] Whereas, in a certain cause of collision, civil and maritime, originally moved and prosecuted before the District Court of the United States for the said district, on behalf of Lucius H. Pratt against the propeller Kentucky, in which the Old Oswego Line was [10] the claimant and respondent, a decree was made and entered on the 5th day of March, 1858, in and by which it was decreed that the said Lucius H. Pratt ought to have and receive the sum of nineteen thousand four hundred and twenty-seven dollars and seventy-five cents, together with his costs and expenses of suit to be taxed,

and it then and there appearing to the said District Court that the said propeller Kentucky has been delivered out of the custody of
[11] the marshal in virtue of a bond executed by the Old Oswego Line as claimant, and by Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, as sureties, which bond is conditioned to abide the decree of the said District Court in the said cause; it was further ordered and decreed that judgment be accordingly entered against the Old Oswego Line, and against the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, the sureties aforesaid, for the said sum of nineteen thousand four hundred and twenty-seven dollars and seventy-five cents, and the costs and expenses, and that within twenty days from the date of the said decree, the said claim-
[12] ant and respondent pay into the registry of the Court the said sum of nineteen thousand four hundred and twenty-seven dollars and seventy-five cents, together with the said costs and expenses, and if the said claimant and respondent should fail to make the said payments, execution should then forthwith issue against it, and its sureties upon the said bond, as by the said decree will more fully and at large appear.

And whereas afterwards, the said cause was brought before the Circuit Court of the United States for the Northern District of New York, on the appeal of the said claimant, which appeal was after-
[13] wards argued in the said Court, and a decree made and entered therein on the twenty-sixth day of May, 1859, in and by which the said decree of the District Court was in all things affirmed, with costs; and whereas the costs of the said suit have been taxed at the sum of two thousand one hundred and fifty-three dollars and fifty-three cents, which amount includes the costs of the District Court and the interest on the amount decreed to be paid in the said
[14] District Court. Now, therefore, in order that full justice may be done in the premises, you are hereby strictly charged, as you have before been strictly charged and commanded, that of the goods and chattels of the Old Oswego Line and of the said Henry Fitzhugh, DeWitt C. Littlejohn, and Andrew Miller, sureties as aforesaid, or of the goods and chattels of either of them, in your district, you cause to be made the said sum of nineteen thousand four hundred and twenty-seven $\frac{75}{100}$ dollars, so decreed to be paid as aforesaid, and also the said sum of two thousand one hundred and fifty-three dollars
[15] and $\frac{53}{100}$ dollars, for the said costs and expenses, and amounting in the whole to the sum of twenty-one thousand five hundred and eighty-one $\frac{28}{100}$ dollars, together with your fees, charges, and expenses, on this execution and of the clerk therein; and you are further charged and commanded, if sufficient goods and chattels of the said the Old Oswego Line, Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, cannot be found in your district, that
[16] you make the said moneys out of any land and tenements, real estate and chattels real, in your district, of which they

were or either of them was seized on the eighteenth day of June, 1859, or on any other day subsequent thereto.

And you are hereby further charged and commanded, jointly and severally, that if sufficient goods and chattels of the said The Old Oswego Line, and of the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, cannot be found in your district, then you attach and arrest the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, if they shall be found in your district, and
[17] them so attached and arrested, you keep under safe and secure arrest, until they shall pay the aforesaid sum of twenty-one thousand five hundred and eighth-one $\frac{28}{100}$ dollars, less the sum of $22 95, paid thereon on the first day of July, 1859, with interest thereon as aforesaid, and your fees and the clerk's fees on this execution, or until they shall be otherwise thereon discharged by due course of law, and that you certify to the said Circuit Court, at the
[18] capital, in the City of Albany, on the third Tuesday (18th) day of October next, what you shall do in the premises, and have you then and there the said moneys to pay in the registry of the Court.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, at the Court House in Canandaigua, on the 2d day of July, 1859, and of the Independence of the United States of America the eighty-third.

AUG'T A. BOYCE,
Clerk.

BOWEN and ROGERS,
Proctors, &c.

(Endorsed.)

The Marshal will levy and collect, and pay into the registry of
[19] the Court the sum of $21,581 $\frac{28}{100}$, less $22 95, paid thereon July 1, 1859, and interest on that sum from the 18th day of June, 1859, besides his fees, poundage, expenses hereon, and clerk's commissions of one per cent.

A. A. BOYCE,
Clerk.

[Schedule B.—Copy of the Bond.]

Know all men by these presents, that we, the Old Oswego Line, an association duly organized under and in pursuance of the laws of the State of New York, located and doing business at Oswego, in
[20] the County of Oswego, as principal, and Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, all of the City and County of Oswego, sureties, are held and firmly bound unto Lucius H. Pratt, of the City of Buffalo, in the penal sum of forty thousand dollars, to be paid unto the said Lucius H. Pratt, to which payment, well and truly to be made, we bind ourselves, our heirs, executors,

and administrators, and successors, jointly and severally, firmly by these presents.

[21] Sealed with our seals, and dated at Oswego, the 27th day of May, in the year of our Lord one thousand eight hundred and fifty-seven.

Whereas, in certain cause of collision, civil and maritime, moved and prosecuted in the District Court of the United States of America for the Northern District of New York, on behalf of the above-named Lucius H. Pratt, against the propeller or vessel called the Kentucky, her boats, tackle, apparel and furniture, a warrant to arrest has been issued out of the said Court against the said propeller, boats, tackle, apparel and furniture, in virtue of which said

[22] warrant the said propeller, her tackle, apparel, furniture and boats, have been arrested by William Wyles, one of the deputies of the Marshal of the said District, and are now in his custody. Now, therefore, the condition of this obligation is such, that if the above bounded Old Oswego Line, the claimant of the said propeller, her boats, tackle, apparel and furniture, shall well and truly abide and answer the decree of the said Court in the aforesaid cause, then this obligation to be void, otherwise it shall remain in full force and virtue.

Old Oswego Line, by A. H. FAILING, Secretary, [L. S.]
HENRY FITZHUGH, [L. S.]
D. C. LITTLEJOHN, [L. S.]
[23] ANDREW MILLER, [L. S.]

Taken and acknowledged this 27th day of May, 1857, by Alonzo H. Failing, Secretary of the Old Oswego Line, Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, before me, and known to me to be the persons described in and who executed the foregoing bond.

ALBERTUS PERRY,
U. S. Commissioner.

I, Enoch B. Talcott, Collector of the Customs of the Port of Oswego, within the Northern District of New York, hereby certify that having made inquiry after Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, proposed to be sureties for the Old

[24] Oswego Line, find that they are sufficient surety for the said the Old Oswego Line in the sum of forty thousand dollars, from the best information I can get, and as such report them accordingly.

Witness my hand this 27th day of May, 1857.

ENOCH B. TALCOTT,
Collector of Customs, Oswego.

New York.

(A true copy.)
AURELIAN CONKLING, Clerk.

Filed August 26th, 1859.

[Schedule C.]

United States Circuit Court,
Northern District of New York.

LUCIUS H. PRATT, Libellant,
agt.
THE PROPELLER KENTUCKY, &c., THE OLD OSWEGO LINE, Claimant and Respondent.

[25] NORTHERN DISTRICT OF NEW YORK,
Oswego County, *ss:*

Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, of the City and County of Oswego, being duly sworn, doth each for himself depose and say, that on the 11th day of August instant, they were severally arrested by Simeon B. Jewett, Esq., a Marshal of the United States for the Northern District of New York, on a process issued out of this Court in the above entitled cause, a copy of which is hereto attached, marked "Schedule A." These deponents now reside, and for many years last past have resided,
[26] in the City and County of Oswego, where they severally have families, wives, and children still residing, and where these deponents have been extensively engaged in business. That the sheriff of said County of Oswego resides in said City of Oswego, where there is a county building erected, and appropriated and used by said county as a county jail. There is also a certain district in and about said jail which has been designated, described, and set apart by the proper authorities under the laws of the State of New York as the jail limits of said jail.

[27] Said arrest was made in said city in the forenoon of said 11th day of August instant, and soon thereafter the said Marshal carried these deponents to Pulaski, in said county, a distance of nearly 25 miles from Oswego, and there delivered them to the keeper of the jail at that place, where they now remain, and are in the custody of William H. Gray, the keeper of said jail, and have been ever since they were committed to his said custody by said Marshal. After they were arrested, and before leaving said city, these deponents caused application to be
[28] made to said marshal, that he should go with them to the office of Messrs. Grant & Allen, and there remain an hour or so to allow them to make an affidavit, on which they as counsel could move for a habeas corpus to bring these deponents before a judge, and ask for their discharge from such imprisonment. The principal ground urged to the Marshal why he should grant this request, was, that at Pulaski there was no commissioner or officer

before whom such affidavits could be taken, and unless these deponents remained in Oswego long enough for the affidavits
[29] to be made, a commissioner would have to be sent to Pulaski to administer the oaths.

These deponents further say, that they are not parties to this suit otherwise than as surety for the claimants. That in May, 1857, the libellant, Lucius H. Pratt, filed his libel in the District Court of the United States for the Northern District of New York, against the propeller Kentucky, her boats, &c., to recover damages alleged to have been sustained by the libellant to his
[30] schooner Cataract, in a collision on Lake Erie, on the evening of the 19th of May, 1857.

Such libel was filed May 23d, 1857. The propeller Kentucky was seized by the United States Marshal on the 27th day of May, 1857, and on the same day a bond for her release was executed by these deponents as surety for the claimant, the Old Oswego Line, and which was duly approved by the Collector of Customs of the United States at the Port of Oswego, and a copy thereof is hereto attached, marked Schedule "B." This bond was delivered to said Marshal the same day, and thereupon he released
[31] and gave up to said claimant said propeller. On the 29th of May, 1857, the Marshal filed with the clerk of said District Court said process, and his return thereon.

The said Old Oswego Line appeared as claimant by A. P. Grant, of Oswego, its proctor, and filed its answer herein with said clerk on the 25th day of June, 1857. This cause was, on notice, brought to trial on the 14th day of October, 1857, in said
[32] District Court, and on the 9th of December, 1857, the district judge, before whom the same was tried, made a decree against the claimant as to the merits, and ordered a reference to the clerk of said Court. On the 12th day of January, 1858, the parties were heard on a reference before said clerk, and on the 22d day of February, 1858, he filed his report on such reference in favor of the libellant for $18,411 05, besides interest. That
[33] on the 5th day of March, 1858, a final decree in the cause in said District Court and in favor of the libellant was entered, $19,427 75, besides costs of suit. An appeal was taken from said decree to this Court, and this cause was brought to argument at a Circuit Court held in Albany, in October, 1858, before his Honor Judge Nelson, who affirmed said decree in the District Court, and on the 6th day of May, 1859, a decree of affirmance was entered herein, and a decree has been perfected
[34] herein in favor of said libellant for the sum of $21,581 28, upon which said last mentioned decree the execution process on which these deponents have been arrested and are imprisoned, was issued, which foregoing statements, as to dates and amounts, are made upon information, and which we believe to be

true. These deponents have been delayed in preparing these papers, and in their application for a "habeas corpus," by two causes: first, that A. Perry, Esq., the only U. S. Commissioner residing in Oswego, is, and has been ever since their arrest, con-
[35] fined to his house by sickness; second, that his Honor Judge Nelson, has been out of this State, holding a Court in Vermont. These deponents have heard read the foregoing petition signed by them, and know the contents thereof, and the same is true of their own knowledge, except such matters as are stated upon information and belief, and as to such matters they believe them to be true.

HENRY FITZHUGH,
DE WITT C. LITTLEJOHN,
ANDREW MILLER.

Subscribed and sworn to this 18th day of August, 1859, before me

ROBT. LANSING,
[36] Commissioner, &c., of the United States Court for the Northern District of New York.

That thereupon the said justice did, pursuant to the prayer of the said petition, order and allow a writ of "habeas corpus" to issue to the said William H. Gray, and to the sheriff of the County of Oswego, commanding them to have the bodies of the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, together with the cause of their imprisonment, before the stated term of the Circuit Court of the United States for the said Northern District of New York, at the capital, in the City of Albany, on
[37] the nineteenth day of October, 1859.

And now, at this day, to wit, on the nineteenth of October, 1859, at the capital, in the City of Albany, before the said Circuit Court, now here held for the said district, by the said Samuel Nelson, justice as aforesaid, appears the said William H. Gray and the said sheriff of the County of Oswego, together with the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller; and the said William H. Gray and the said sheriff of the County of Oswego, do now here return to the said writ of habeas
[38] corpus, that they have the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, here present, and that they hold and detain them under and by virtue of the following state of facts, to wit: on the 23d day of May, 1857, Lucius H. Pratt filed his libel in the District Court of the United States for the Northern District of New York, against the propeller Kentucky, her boats, &c., in a cause of collision, civil and maritime, and on the 27th of May, 1857, the said propeller Kentucky was seized
[39] by the Marshal of the said district upon process issued upon the filing of the said libel, and on the same day a

bond was executed by the Old Oswego Line, the claimant of the said propeller, and by the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, as its sureties, bearing that date, pursuant to the Act of Congress passed on the 3d day of March, 1847, entitled "An Act for the reduction of costs and expenses of proceedings in Admiralty against ships and vessels," and conditioned
[40] to abide and answer the decree of the said Court in the said cause; and on the same day, and after being approved by the Collector of the Port of Oswego, the said bond was delivered to the said Marshal by or in behalf of said claimant, who thereupon accepted and received the same, and the said propeller Kentucky was thereupon discharged from custody. That such proceedings were thereafter had in the said cause, that thereafter at a term of the said District Court held in and for the said district at the United States District Court rooms, in the City of Buffalo,
[41] by and before the Honorable Nathan K. Hall, the judge of the said district, on the ninth day of December, 1857, it was among other things ordered and decreed that the collision mentioned and referred to in the pleadings in the said cause, occurred by and through the negligence, fault, and misconduct of those who were in charge of the said propeller Kentucky, and that the said propeller, her tackle, apparel and furniture, thereby became liable for all the damages occasioned by the said collision;
[42] and that afterwards, and on the fifth day of March, 1858, a further decree was duly made in the said cause by the said District Court, in and by which it was among other things ordered, adjudged and decreed, that the said libellant recover in the said cause the damages by him sustained by reason of the said collision, amounting to the sum of $19,427 75, together with his costs and expenses to be taxed, and it was therein further decreed that judgment be entered against the said The Old Oswego Line, and against the said Henry Fitzhugh, De Witt C. Littlejohn, and
[43] Andrew Miller, the sureties aforesaid, for the said sum of $19,427 75, together with such costs and expenses, and that the said claimant pay such sums into the registry of the said Court within twenty days from the making of such decree, and in case of a failure on the part of the said claimant to make such payment, execution do then forthwith issue against the said claimant, and the said sureties upon the said bond.

That thereafter and on the third day of April, 1858, the said
[44] cause was duly appealed to the Circuit Court of the United States for the Northern District of New York, and thereafter at a term of the Circuit Court held at the capital, in the City of Albany, on the 21st day of October, 1858, the said appeal was brought on to be heard in the said Circuit Court, then and there held by and before the Honorable Samuel Nelson, a justice of the Supreme Court of the United States, and a decree

was thereafter, and on the twenty-sixth day of May, 1859, made
[45] and entered in the said cause, in and by which the said decree of the said District Court was in all things affirmed with costs, which costs were afterwards taxed at two thousand one hundred and fifty-three dollars and fifty-three cents.

That thereafter, and on or about the second day of July, 1859, an execution was duly issued in the said cause, and delivered to the Marshal of the said district, of which the following is a copy:

UNITED STATES OF AMERICA,
Northern District of New York.

[46] The President of the United States of America to the Marshal of the Northern District of New York, and to his deputies, greeting:

Whereas, in a certain cause of collision, civil and mara-
[L. S.] time, originally moved and prosecuted before the District Court of the United States for the said district, on behalf of Lucius H. Pratt against the propeller Kentucky, in which the Old Oswego Line was the claimant and respondent, a decree was made and entered on the fifth day of March, 1858, in and by which it was decreed that the said Lucius H. Pratt ought to have and
[47] receive the sum of nineteen thousand four hundred and twenty-seven dollars and seventy-five cents, together with his costs and expenses of suit to be taxed; and it then and there appearing to the said District Court that the said propeller Kentucky has been delivered out of the custody of the Marshal, in virtue of a bond executed by the Old Oswego Line, as claimant, and by Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, as sureties, which bond is conditioned to abide the decree of the said District Court in the said cause, it was further ordered and decreed that judgment be accordingly entered against the Old Oswego Line
[48] and against the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, the sureties aforesaid, for the said sum of nineteen thousand four hundred and twenty-seven dollars and seventy-five cents, and the costs and expenses, and that within twenty days from the date of the said decree, the said claimant and respondent pay into the registry of the court the said sum of nineteen thousand four hundred and twenty-seven dollars and seventy-five cents, together with the said costs and expenses; and if the said claimant and respondent should fail to make the said payments, execution should then forthwith issue against it and its sureties upon the said bond, as by the said decree will more fully and at large appear.

And whereas, afterwards, the said cause was brought before the
[49] Circuit Court of the United States for the Northern District of New York, on the appeal of the said claimant, which

appeal was afterwards argued in the said court, and a decree made and entered therein on the twenty-sixth day of May, 1859, in and by which the said decree of the District Court was in all things affirmed, with costs; and whereas, the costs of the said suit have been taxed at the sum of two thousand one hundred and fifty-three dollars and fifty-three cents, which amount includes the costs of the District Court, and the interest on the amount decreed to be
[50] paid in the said District Court: Now, therefore, in order that full justice may be done in the premises, you are hereby strictly charged, as you have before been strictly charged and commanded, that, of the goods and chattels of the said Old Oswego Line, and of the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, sureties as aforesaid, or of the goods and chattels of either of them in your district, you cause to be made the said sum of nineteen thousand four hundred and twenty-seven $\frac{75}{100}$
[51] dollars, so decreed to be paid as aforesaid, and also the said sum of two thousand one hundred and fifty-three and $\frac{53}{100}$ dollars for the said costs and expenses, and amounting in the whole to the sum of twenty-one thousand five hundred and eighty-one $\frac{28}{100}$ dollars, together with your fees, charges, and expenses on this execution, and of the clerk therein; and you are further charged and commanded, if sufficient goods and chattels of the said the Old Oswego Line, Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, cannot be found in your district, that you make the said
[52] moneys out of any land and tenements, real estate and chattels real in your district, of which they were, or either of them, was seized on the eighteenth day of June, 1859, or on any other day subsequent thereto.

And you are hereby further charged and commanded, jointly and severally, that if sufficient goods and chattels of the said the Old Oswego Line, and of the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, cannot be found in your district, then
[53] you attach and arrest the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, if they shall be found in your district, and them so attached and arrested you keep under safe and secure arrest until they shall pay the aforesaid sum of twenty-one thousand five hundred and eighty-one $\frac{28}{100}$ dollars, less the sum of $22 95, paid thereon on the first day of July, 1859, with interest thereon as aforesaid, and your fees and the clerk's fees on this execution, or until they shall otherwise thereon be discharged
[54] by due course of law, and that you certify to the said Circuit Court, at the capital in the City of Albany, on the third Tuesday (18th day) of October next, what you shall do in the premises; and have you then and there the said moneys to pay in the registry of this court.

Witness, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, at the Court House in Canan-

daigua, on the 2d day of July, 1859, and of the Independence of the United States of America the eighty-third.

AUG'T A. BOYCE,
Clerk.

BOWEN AND ROGERS,
Proctors.

(Endorsed.)

[55] The Marshal will levy and collect, and pay into the registry of the court, the sum of $21,581 $\frac{28}{100}$, less $22 95, paid thereon July 1, 1859, and interest on that sum from the 18th day of June, 1859, besides his fees, poundage, and expenses hereon, and clerk's commission of one per cent.

A. A. BOYCE,
Clerk.

That thereafter, and on the eleventh day of August, 1859, the [56] Marshal of the said district being unable to collect any portion of the amount directed to be collected in and by the said execution, and under and by virtue of the said execution, arrested the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, and delivered them to the said sheriff of the County of Oswego, and to the said William H. Gray, as the keeper of the jail of the County of Oswego, and that the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller still remain in their custody, under and by virtue thereof.

And after hearing the allegations of the said Henry Fitzhugh, [57] De Witt C. Littlejohn, and Andrew Miller, and of the counsel of the libellant in the said cause, it is ordered and adjudged that the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller were not liable to arrest upon the execution so issued as aforesaid, and that they are entitled, upon the facts stated in such return, to their discharge from custody; and it is further ordered and adjudged that they be and are hereby discharged from custody. Judgment signed this 17th October, 1860.

S. NELSON.

A. A. BOYCE,
Clerk.
Filed October 17th, 1860.

To the Supreme Court of the United States:

[58] The return to the preceding writ of error appears by the schedule hereto annexed, consisting of the record of judgment.

The answer of the Judges of the Circuit Court of the United States in and for the Northern District of New York.

AUGUSTUS A. BOYCE,
Clerk of the Circuit Court of the United States
for the Northern District of New York.

[Assignment of Error.]

SUPREME COURT OF THE UNITED STATES.

In the matter of the application of HENRY FITZHUGH, DE WITT C. LITTLEJOHN, and ANDREW MILLER, for a writ of habeas corpus to discharge them from custody, &c., in which proceeding Lucius H. Pratt is plaintiff in error, and the said Fitzhugh, Littlejohn, and Miller, are defendants in error. } Of December Term, 1859.

Afterwards, to wit, on the twenty-seventh day of November, in the year 1860, in the same term, before the Supreme Court of the United States, at the City of Washington, comes the said Lucius H. Pratt, by Dennis Bowen, his attorney, and says:

That in the record and proceedings aforesaid, and also in the giving the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid, it is adjudged that the said Henry Fitzhugh, Andrew Miller, and De Witt C. Littlejohn were not liable to arrest and imprisonment upon the execution in the said record mentioned, and that they were entitled, upon the facts in the said record contained, to be discharged from custody, and that they be discharged from custody.

Whereas, by the law of the land, the said judgment ought to have been given for the said Lucius H. Pratt, and that the said Fitzhugh, Littlejohn, and Miller were liable to be arrested and imprisoned upon the execution in the said record mentioned, and that their application to be discharged from custody upon the said application ought to have been denied.

And the said Lucius H. Pratt prays that the judgment aforesaid, for the errors aforesaid, and other errors in the said record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment.

DENNIS BOWEN,
Attorney for L. H. PRATT,
Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

In the matter of the application of HENRY FITZHUGH, DE WITT C. LITTLEJOHN, and ANDREW MILLER, for a writ of habeas corpus, to discharge them from custody, &c., in which proceeding Lucius H. Pratt is plaintiff in error, and the said Fitzhugh, Littlejohn, and Miller, are defendants in error.	Joinder in Error.

And hereupon, afterwards, to wit, on the first day of December, in the year 1860, in the Term of December, 1860, the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, by Abraham P. Grant, their attorney, come into court here, and say that there is no error, either in the record and proceedings aforesaid, or in the giving the judgment aforesaid, whereby it was adjudged that the said Henry Fitzhugh, De Witt C. Littlejohn, and Andrew Miller, were not liable to arrest and imprisonment on the execution in the said record mentioned, and that they were entitled, upon the facts of the said record contained, to be discharged from custody, and that they be discharged from custody.

And they pray that the Supreme Court of the United States, now here, may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment and proceedings aforesaid, in manner aforesaid given, may in all things be affirmed, &c.

A. P. GRANT,
Attorney for Fitzhugh, Littlejohn, and Miller,
Defendants in Error.

POINTS.

SUPREME COURT—U. S.

Fitzhugh and others *ads.* Pratt, Plaintiff in Error. } No. 151. Writ of Error.

STATEMENT OF CASE.

In May, 1857, the plaintiff in error filed a libel in the District Court of the United States for the Northern District of New York, against the propeller Kentucky, in a cause of collision.

The Marshall of said Northern District seized said propeller in the city of Oswego, upon process issued by said court on the filing of said libel, which propeller was owned and used upon the northern lakes by "The Old Oswego Line," an association duly organized under the laws of the State of New York.

The Old Oswego Line appeared and answered in said cause as claimant, and procured the release of said propeller from such seizure, by executing a bond, as principal, and procuring Henry Fitzhugh, DeWitt C. Littlejohn and Andrew Miller to execute the same as sureties, of which bond the following is a copy:

"Know all men by these presents, that we, the Old Oswego Line, an association duly organized under and in pursuance of the laws of the State of New York, located and doing business at Oswego, in the county of Oswego, as principal, and Henry Fitzhugh, DeWitt C. Littlejohn and Andrew Miller, all of the city and county of Oswego, sureties, are held and firmly bound unto Lucius H. Pratt, of the city of Buffalo, in the penal sum of forty thousand dollars, to be paid unto the said Lucius H. Pratt, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and ad-

ministrators and successors, jointly and severally, firmly by these presents:

Sealed with our seals and dated at Oswego, the 27th day of May, in the year of our Lord, one thousand, eight hundred and fifty-seven.

WHEREAS, in certain cause of collision civil and maritime, moved and prosecuted in the District Court of the United States of America, for the Northern District of New York, on behalf of the above named Lucius H. Pratt, against the propeller or vessel called the Kentucky, her boats, tackle, apparel and furniture, a warrant to arrest has been issued out of the said court against the said propeller, boats, tackle, apparel and furniture, in virtue of which said warrant the said propeller, her tackle, apparel, furniture and boats have been arrested by William Wyles, one of the deputies of the Marshall of the said District, and are now in his custody. Now, therefore, the condition of this obligation is such, that if the above bounden Old Oswego Line, the claimant of the said propeller, her boats, tackle, apparel and furniture, shall well and truly abide and answer the decree of the said court in the aforesaid cause, then this obligation to be void, otherwise in full force and virtue.

Old Oswego Line by A. H. FAILING, Sec'y, [L. S.]
HENRY FITZHUGH, [L. S.]
D. C. LITTLEJOHN, [L. S.]
ANDREW MILLER. [L. S.]

A decree was rendered in the District Court in favor of the libellant, from which the claimant took an appeal to the circuit court, where the cause was heard and the decree of the District court was affirmed.

The libellant then caused to be issued the execution which is set out in the record.

Upon this execution the three respondents were arrested and committed to the jail of Oswego county, where they remained in custody of the jailor until discharged by justice ~~Wilson~~ Nelson.

II.

I. A writ of error does not lie in this case.
Judiciary Act 1789, and Amendments.
Hurd on Hab. Corpus, 562, 570. and cases cited.
Conk. Ad., 2 vol., 372 and 3, and cases cited.
18 How., 109; 9 Texas, 105.
20 "

A writ of error does not lie to any other than a final judgment.
State vs. Ruthven, 19 Mis., (4 Bennet,) 382.

An order of the court below to quash an execution is not a judgment to which a writ will lie.
McCaryo vs. Chapman, 20 How., 555.

A refusal of the court below to grant a new trial affords no ground for a writ of error.
20 How., 29; id., 448.

BRIEF.

II. The obligors to the bond are not liable to imprisonment on the decree for the libellant.

(1.) They were mere sureties; not the principal nor the party.

(2.) They were not wrong doers. They had no interest in or control over the propeller; neither aided, abetted or were cognizant of the collision.

(3.) As sureties, they covenanted and agreed that their principal should "abide and answer the decree of the court." In other words, that the claimant should pay such decree as might be obtained in the cause.

(4.) No person can be arrested or imprisoned for any debt or demand founded or due upon any contract, express or implied.

Vide 3 R. Stat. of N. Y. 5 ed. 126.

"No person shall be arrested or imprisoned on any civil process issuing out of any court of law, or on any execution issuing out of any court of equity in any suit or proceeding instituted for the recovery of any money, due upon any judgment or decree founded upon contract or due upon any contract express or implied, or for the recovery of any damages for the non-performance of any contract."

(5.) The laws of the United States adopt the laws of the several States respectively in the exemption of persons from arrest and imprisonment for debt.

"No person shall be imprisoned for debt in any State, on process issuing out of any court of the United States, where by the laws of the State imprisonment for debt has been abolished; where by the laws of the State, imprisonment shall be allowed under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States, and the same procoedings shall be had therein as are adopted in the courts of such State."

5 Stat. at large, 321. ch. 35, act of Feb. 28. 1839.

By the act of June 14, 1841—The foregoing enactment is expressly declared to be prospective, so as to embrace all future as well as existing State laws abolishing imprisonment for debt.

Id. 410, ch. 2.

This court, in order to give force and effect to said acts of Congress, at the December Term thereof in 1850, adopted the following rule.

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RULE 48.—In all suits in *personum* where a simple warrant of arrest shall be issued and executed, bail shall be taken by the marshall, and the court in those cases only in which it is required by the laws of the state where an arrest is made upon similar or analagous process issuing from the state court.

And imprisonment for debt on process issuing out of the Admiralty court, is abolished in all cases, when by the laws of the state in which the court is held, imprisonment for debt has been or shall be hereafter abolished upon similar or analagous process issuing from a state court."

This rule is in furtherance of the act of Congress, adopting and making applicable the laws of the state to the proceedings of the courts of the United States in enforcing the final process of that court and the practice and proceedings upon execution.

It provides expressly, that imprisonment for debt on process issuing out of the Admiralty court is abolished, where by the laws of the state such imprisonment is abolished.

These parties were sureties and are liable only upon their bond, and because they signed a bond conditioned "to abide and answer the decree of the court."

The decree, orders that "judgment be accordingly entered against the said the Old Oswego Line," and the sureties naming them for the amount of the money, "and that within 20 days from that date, the said *claimant* and *respondent* pay" the amount of such decree and "that if the said claimant and respondent shall fail so to make the said payment, execution do then forthwith issue against *it* and *its* sureties *upon the said bond.*"

The sureties became bound for the payment of the decree,

and when the decree was entered, the sureties became liable to pay *the debt.*

When the amount of damages was reported and the decree entered, the original cause of action became merged, and the sureties became then for the first time in any way liable.

By the act of 1828 it is enacted, "that writs of execution and other final process issued on judgments and decrees, rendered in any of the courts of the United States and the proceedings thereon, shall be the same, except their style, in each state as are now used in the courts of such state.

4 Stat. at large, 278.

Judge Conkling in his Treatise, p. 464, says, "it results then that the forms of executions, (except their style,) from the courts of the United States, *their force* and *effect* and the duty of the marshall in levying, appraising and selling, are to be ascertained by reference to the laws of the respective states, &c.

Vide 465, 466.

The act last referred to, adopting the proceedings on executions, embraces as part of those proceedings, the right secured by the then existing laws of the State, to an imprisoned debtor, to have the privileges of the jail limits.

U. States vs. Knight, 14 Peters' Rep. 301.

In deciding the case just cited, the court at page 472, say: "It is certainly true, that this court has construed the acts of Congress, adopting State laws in relation to writs and processes and the proceedings thereon, as applying to the State laws then in force.

By the recommendation of Congress, the several States have enacted laws making it the duty of the proper officers to receive into their custody, persons committed under the authority of the United States, and making them responsible for their safe keeping.

Conk. T. 227, 229.

Vide 3 R. S. New York, 5 ed. 743, §121, 122.

While the sheriff or keeper is made answerable for the safe

keeping of the prisoners, the Marshall is discharged from all responsibility on delivering them to such sheriff or keeper.

Conkling, 229.

Randolph vs. Donaldson, 9 Cranch, 76.

Every person who shall be in the custody of the sheriff by virtue of any execution in a civil action, shall be entitled to be admitted to the liberties of the jail which shall have been established, &c. upon executing a bond, &c.

2 R. S. New York, 733, §61.

Vide also page 727, §24.

A. P. GRANT,
Counsel for Resp'ts.

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Supreme Court of the United States.

LUCIUS H. PRATT,
Plaintiff in Error.

vs.

HENRY FITZHUGH, DE WITT C. LITTLEJOHN AND ANDREW MILLER.
Defendants in Error.

POINTS
On the part of the
Plaintiff in Error.

MATERIAL FACTS.

In May, 1857, Mr. Pratt (the plaintiff in error herein), filed his libel in the District Court for the Northern District of New York, against the Propeller Kentucky, her boats, &c., to recover damages sustained by him on account of a collision with a vessel owned by him on Lake Erie. The Kentucky was duly seized on the 27th of said month of May, and on the same day a bond for her release was executed by the defendants, as sureties, for the claimant of the Kentucky, the old Oswego Line, which bond was duly approved, and the Kentucky was discharged. A recovery was had by Mr. Pratt, and a decree perfected in his favor in May, 1859, for $21,581 28, against the old Oswego Line, and against the said Henry Fitzhugh, De Witt C. Littlejohn and Andrew Miller, the sureties aforesaid, the defendants named herein. (Pages of Record, 6, 7, 9, 10, 11 and 12.)

About the 2nd of July, 1859, an execution was duly issued to the Marshal of the Northern District of New York, commanding him to make the amount of the decree of the goods and chattels of the old Oswego Line and of the said Fitzhugh, Littlejohn and Miller as such sureties, or of the goods and chattels of either, together with his fees, &c., and that if sufficient goods and chattels of the said parties could not be found in his district that he make the same out of their lands, tenements, real estate and chattels real in his district, &c. Further, that if sufficient goods and chattels

of the said parties could not be found, then that he attach and arrest said Fitzhugh, Littlejohn and Miller, and keep them under safe and secure arrest until they should pay said moneys, &c., or until they should otherwise be discharged. (See copy of Execution on pages of Record, 12, 13, and 14.)

The Marshal being unable to collect any part of the said moneys so directed to be collected in and by the said execution, thereafter and on the 11th of August, 1859, did by virtue of said execution arrest said Fitzhugh, Littlejohn and Miller, and commit them to the jail of the county of Oswego in his district. (Page of Record, 14.)

Upon this state of facts the said Fitzhugh, Littlejohn and Miller sued out a writ of Habeas Corpus, which was duly allowed by Mr. Justice Nelson, returnable at a term of the Circuit Court, held by and before the said Justice, at the city of Albany, in October, 1859, directed to the jailor and sheriff of the county of Oswego, who made return of the facts substantially as above set forth, whereupon said court adjudged that said Fitzhugh, Littlejohn and Miller were not liable to arrest and were entitled upon the facts stated in such return to be discharged from custody ; and it was further adjudged that they be, and they were accordingly discharged. (Pages of Record, 10 and 14.)

The case is here by Writ of Error, and the question presented by the assignment and joinder is whether said Fitzhugh, Littlejohn and Miller were liable to arrest and imprisonment. (Pages of Record, 15 and 16.)

POINTS.

FIRST.—The State of New York has not abolished imprisonment for debt within the meaning of the acts of Congress of February 28th, 1839, and of January 14th, 1841.

(5 Statutes at Large, pp. 321 and 410.

1. The New York statute (H. R. S., p. 52) is entitled an "Act to abolish imprisonment for debt and to punish fraudulent debtors." The first section declares in substance that no person shall be arrested or imprisoned on any process or execution issued in any suit instituted for the recovery of money due upon any judgment or decree *founded upon contract or due upon any contract, express or*

implied, or for the recovery of any damages for a violation of any such contract.

The second section expressly declares that in actions upon contract for moneys received in a fiduciary capacity, defendants therein may be imprisoned, and a like liability to imprisonment is declared in subsequent sections of the act in suits for fines and penalties, and on contracts to marry, and for moneys collected by any public officer, &c.

In the same act provision is made for enforcing collection of debts due upon contract in certain specified cases, viz: By warrants of arrest and commitment to be issued by a Judge of the State Courts, whenever any plaintiff shall establish to his satisfaction either of the following particulars:

"1. That the defendant is about to remove any of his property out of the jurisdiction of the court in which such suit is brought, with intent to defraud his creditors: or

"2. That the defendant has property or rights in action, which he fraudulently conceals, or that he has rights in action, or some interest in any public or corporate stock, money or evidences of debt, which he unjustly refuses to apply to the payment of any judgment or decree which shall have been rendered against him belonging to the complainant: or

"3. That he has assigned, removed, or disposed of, or is about to dispose of, any of his property, with the intent to defraud his creditors: or

"4. That the defendant fraudulently contracted the debt or incurred the obligation, respecting which such suit is brought."

By section 9 of the same statute it is provided that the officer, if satisfied that either of these particulars has been established, he shall issue his warrant to commit the defendant to the county jail, to be detained there until he shall be discharged according to law, unless he shall pay the debt or demand, or give approved security for the payment thereof, or make an assignment of his property, &c.

2. From these provisions of the New York statute it will be seen that the State has not entirely abolished, but has only modified, its laws concerning imprisonment for debt. It is therefore not within the first clause of the act of February, 1839, which clearly

contemplates an entire and not partial abolition of imprisonment for debt. By a careful inspection of the New York statute (the important provisions of which are cited supra,) and of the practice under it as regulated by the State Courts, it will be seen that "it expressly allows a creditor to imprison his debtor in certain enumerated cases, and this not by way of punishing the debtor, but as a remedy to enforce payment of the debt."

3. The important inquiry, I apprehend, is whether the last clause of the act of February 28th, 1839, requires such a construction as by its terms and in its intent adopts the modified laws of New York concerning imprisonment for debt.

The clause provides that, "when by the laws of a State imprisonment for debt shall be allowed under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the Courts of the United States, and the same proceedings shall be had therein as are adopted in the Courts of such State."

New York allows imprisonment for debt "under certain restrictions and conditions," but it is confidently believed that Congress has not adopted and made them applicable to the process of the United States Courts.

To justify this conclusion it is only necessary to see what this court has determined from time to time in cases somewhat analogous.

The process act of 1828 (4 Statutes at Large, 278), section 3, provides, that "writs of execution and other final process issued on judgments and decrees and the proceedings thereupon, shall be the same in each State respectively as are now used in the Courts of such State."

This court in giving construction to this act, as well as to the acts of 1789 and 1792, (I. Statutes at Large, pp. 93 and 275) which includes in general terms all the regulations incident to process, has repeatedly held that there were certain regulations made by State laws concerning their process which were not intended to be adopted by the Courts of the United States.

The following are some of the cases: In Palmer vs. Allen, (7 Cranch, 550) the question was whether a State law which did not allow a debtor to be imprisoned on mesne process without a mitti-

mus to be granted by a magistrate was applicable to the case of a debtor who had been committed by the Marshal under the authority of a capias issued out of a Court of the United States. The Court held that it was not. This is its language: "But it is equally clear to this court that the law above alluded to, commonly called the process act, does not adopt the law of Connecticut which requires the mittimus in civil cases. This is a peculiar municipal regulation, not having any immediate relation to the progress of a suit, but imposing a restraint on their State officers in the execution of the process of their courts, and is altogether inoperative upon the officers of the United States in the execution of the mandates which issue to them."

The soundness of this decision and the reasons upon which it is based are fully recognized in Wayman vs. Southard, 10 Wheat. p. 1.

This court has held that discharges granted to insolvent debtors under State laws were inoperative as to debtors committed on executions issued from a Court of the United States.

Bank of U. S. vs. Tyler, 4 Peters, p. 366.

Duncan vs. Darst, 1 Howard, p. 301.

It has also been held that although by a State law an injunction operated as a *supersedeas* of an execution, the rule had no application to executions issuing from the Courts of the United States.

Boyle vs. Zacharie, 6 Peters, p. 648.

And again in McNutt vs. Bland, 2d Howard, p. 9, it was decided that a State law which permitted a sheriff to discharge a debtor from imprisonment in default of payment of prison fees, did not justify his discharge by the sheriff from a jail to which he had been committed by the Marshal on an execution issuing out of a Court of the United States.

4. This precise question has been decided in the First Circuit, in the matter of Watson Freeman, (2 Curtis, p. 491.) In that case the State of Massachusetts, where the question arose, had a modified non-imprisonment law similar in its provisions to that of New York. Mr. Justice Curtis, from whose well-considered and elaborate opinion I have mainly compiled this portion of my Brief, after citing and commenting upon the cases above enumerated, remarks, (page 494):

"The results of these decisions and the principles on which they have been made, may be stated as follows:

"1. That the adoption of State laws of proceeding by congress though general, does not include all State laws concerning process.

"2. That among others not included are those which are addressed to State courts and magistrates accompanied with grants of power which enable them to execute such laws, which powers the Courts of the United States do not possess and cannot exercise."

It is apparent, I apprehend, that the United States Courts are incompetent to apply the special remedies embraced in the several provisions of the New York non-imprisonment law, no power having been conferred upon them for any such purpose, and it follows, of course, that if a judgment creditor in the United States Court is to be deprived of his right to arrest and imprison his debtor, his remedy will fall far short of that of a creditor in the State Court. Surely this court will not, unless absolutely compelled, give a construction to the act of 1839, which shall work such manifest injustice.

The special remedies and proceedings for enforcing payment contained in the non-imprisonment laws of New York and Massachusetts are, in most respects, quite similar. Mr. Justice Curtis, in further commenting upon this question says (at page 497):

"It may be assumed, with some degree of safety, that if a State really and entirely abolishes imprisonment for debt, the process of the Courts of the United States will be as effectual as the process of the Courts of the States. Not so, if the right of the creditor is modified and restricted; for it may well be, and is so in this case, that those modifications and restrictions will be accompanied with sanctions and safeguards which the Courts of the United States are incompetent to apply."

This law of the State of Massachusetts, while it restricts the right of the creditor, and imposes on him new conditions, also provides, in the same connection, and as part of the same system, for highly penal proceedings against debtors, viewed merely as instruments for enforcing payment; these latter are of great practical importance, and if the conditions aud limitations imposed on the creditor were adopted while the penal proceedings against the debtor were rejected, it is clear that a system of law to compel the payment of debts

differing very widely from that enacted by the State, would be brought into operation. Those penal enactments are not only found in the same law, and make part of the same general system with the restrictions upon imprisonment, but the proceedings under them are part of the same course of proceeding taken to enforce the judgments of the Courts. And if a judgment creditor in the Courts of the United States were deprived of recourse to them, he would be placed upon a different and far less advantageous footing, than a judgment creditor in a State Court.

Yet it is certain that none of these parts of the law of Massachusetts can have been adopted by Congress.

In Gwin vs. Breedlove (2 How. 29), it was held that the Process Act of 1828 had not adopted similar provisions of State laws, though in existence, when that act was passed; because the Courts of the United States cannot execute the criminal laws of the States.

SECOND.—The process upon which defendants were arrested and imprisoned, is in strict conformity with the 21st rule of this Court, adopted in 1845.

1. This rule was made and promulgated pursuant to section 6 of the Act of August 23d, 1842, (5 Statutes at Large, p. 518,) and it provides that "in all cases where the decree is for the payment of money, the *libellant* may at his election have an attachment to compel the defendant to perform the decree, or of a writ of execution, in the nature of a *capias* and of a *fieri facias*, commanding the marshal or his deputy to levy the amount thereof of the goods and chattels of the defendant, and for the want th his body, to answer the exigency of the execution."
2. Rule 48, (adopted in 1850,) it is true, qualifies F does not apply to libels *in rem*, and has no application, therefore, to this case.

The first part of this rule refers to the kind of bail to be taken in actions in *personam*, upon warrant of arrest. The latter part of it is as follows: "And imprisonment for debt on process issuing out of the Admiralty Court, is abolished in all cases where, by the

"The results of these decisions and the principles on which they have been made, may be stated as follows:

"1. That the adoption of State laws of proceeding by congress though general, does not include all State laws concerning process.

"2. That among others not included are those which are addressed to State courts and magistrates accompanied with grants of power which enable them to execute such laws, which powers the Courts of the United States do not possess and cannot exercise."

It is apparent, I apprehend, that the United States Courts are incompetent to apply the special remedies embraced in the several provisions of the New York non-imprisonment law, no power having been conferred upon them for any such purpose, and it follows, of course, that if a judgment creditor in the United States Court is to be deprived of his right to arrest and imprison his debtor, his remedy will fall far short of that of a creditor in the State Court. Surely this court will not, unless absolutely compelled, give a construction to the act of 1839, which shall work such manifest injustice.

The special remedies and proceedings for enforcing payment contained in the non-imprisonment laws of New York and Massachusetts are, in most respects, quite similar. Mr. Justice Curtis, in further commenting upon this question says (at page 497):

"It may be assumed, with some degree of safety, that if a State really and entirely abolishes imprisonment for debt, the process of the Courts of the United States will be as effectual as the process of the Courts of the States. Not so, if the right of the creditor is modified and restricted; for it may well be, and is so in this case, that those modifications and restrictions will be accompanied with sanctions and safeguards which the Courts of the United States are incompetent to apply."

This law of the State of Massachusetts, while it restricts the right of the creditor, and imposes on him new conditions, also provides, in the same connection, and as part of the same system, for highly penal proceedings against debtors, viewed merely as instruments for enforcing payment; these latter are of great practical importance, and if the conditions aud limitations imposed on the creditor were adopted while the penal proceedings against the debtor were rejected, it is clear that a system of law to compel the payment of debts

differing very widely from that enacted by the State, would be brought into operation. Those penal enactments are not only found in the same law, and make part of the same general system with the restrictions upon imprisonment, but the proceedings under them are part of the same course of proceeding taken to enforce the judgments of the Courts. And if a judgment creditor in the Courts of the United States were deprived of recourse to them, he would be placed upon a different and far less advantageous footing, than a judgment creditor in a State Court.

Yet it is certain that none of these parts of the law of Massachusetts can have been adopted by Congress.

In Gwin vs. Breedlove (2 How. 29), it was held that the Process Act of 1828 had not adopted similar provisions of State laws though in existence, when that act was passed; because the Courts of the United States cannot execute the criminal laws of the States."

SECOND.—The process upon which defendants were arrested and imprisoned, is in strict conformity with the 21st rule of this Court, adopted in 1845.

1. This rule was made and promulgated pursuant to section 6 of the Act of August 23d, 1842, (5 Statutes at Large, p. 518,) and it provides that "in all cases where the decree is for the payment of money, the *libellant* may at his election have an attachment to compel the defendant to perform the decree, or of a writ of execution, in the nature of a *capias* and of a *fieri facias*, commanding the marshal or his deputy to levy the amount thereof of the goods and chattels of the defendant, and for the want thereof to arrest his body, to answer the exigency of the execution." in Admiralty
2. Rule 48, (adopted in 1850,) it is true, qualifies Rule 21, but it does not apply to libels *in rem*, and has no application, therefore, to this case.

The first part of this rule refers to the kind of bail to be taken in actions in *personam*, upon warrant of arrest. The latter part of it is as follows: "And imprisonment for debt on process issuing out of the Admiralty Court, is abolished in all cases where, by the

laws of the State in which the court is held, imprisonment for debt has been or shall be abolished, upon similar or analogous process issuing from a State court."

"What is the meaning of "similar or analagous process," as used here?

Clearly it must mean process issuing in similar or analogous cases, and which is intended to accomplish the same practical end. For example, executions upon a decree *in personam* in a cause of contract. In such a case capias would not be proper process, for by the laws of New York, (provided always that she has abolished imprisonment for debt, within the meaning of the acts of 1839 and 1841,) in an ordinary action upon contract, execution against the body is not authorized.

But in the case of a libel *in personam* for assault and battery, a *capias* might issue upon the judgment, for by the State law an execution against the person would be proper process.

The two classes of cases cited above as illustrative of the true meaning of Rule 48, are "similar and analagous," and the practical end to be attained in each is the same, namely, the collection of the judgment or decree.

3. There is nothing in any action known to the New York State Courts, similar or analogous to a libel *in rem*.

It is, in respect to any practice or proceeding in the courts of that State, entirely anomalous in its nature and character.

It is not only so in its inception; it continues throughout.

If a bond or stipulation be given, and the *res* is discharged from arrest, the character of the suit is not changed. It is still a proceeding *in rem*, and so continues to the end.

The stipulators or bondsmen are deemed to have put themselves in the stead of the *res*, and to have committed their persons as well as their goods and chattels to the payment of the decree.

2d Brown's Civil and Admiralty Law, pp. 407, 408, 409.

Lane vs. Townsend, Ware's Rep., 299.

2d Conkling's Admiralty, p. 85.

The bond upon which the vessel in this case was discharged, was executed under the statute of March 3d, 1847, (9 Statutes at Large, p. 181,) but there is no reason for supposing that by that

statute it was intended that bondsmen and stipulators should incur any different liability from that of stipulators under the old practice, or that by giving a bond or stipulation under that act, the suit should be in any sense changed in its character.

That act is entitled "An act for the reduction of the costs and expenses of proceedings in Admiralty against ships and vessels," and the main object of it was to enable the claimant of a vessel to procure its discharge before the expenses of arrest should be incurred.

4. There is no law which gives a lien upon the real estate of the sureties in a case like this, and execution cannot properly go against the realty.

This was so under the English admiralty practice—See 2d Brown's Civil and Admiralty Law, p. 409—also with the "fide jussory caution" of the Roman admiralty laws.

The 21st Rule of this court was framed upon this idea.

It is insisted that the act of July 4th, 1840, is in conflict with this proposition, but this, I apprehend, is not so.

That law provides "that judgments and decrees hereafter rendered in the Circuit and District Courts of the United States, within any State, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees in the courts of such State, now cease by law to be liens thereon." (Dunlop's Dig., p. 974.)

Liens upon real estate are not to be created by implication, I apprehend, and even had the language of this statute been so constructed that it would read "that judgments in admiralty cases should cease to be a lien," &c., it would of itself hardly create a lien where by law none had previously existed.

At any rate, no implication arises where the enactment is, in its whole extent, applicable to and can take effect upon a condition of things which is fully and clearly expressed.

So far as the Circuit Courts are concerned, they have always had jurisdiction of law and equity cases, and many of the District Courts of the United States have had a like jurisdiction conferred upon them, and judgments in these cases were by law liens upon real estate before the act of 1840, and as early certainly as the act of May, 1828.

It will therefore be seen that the statute is in perfect harmony with previous legislation, and requires no material to be raised by implication on which to expend its force. It means simply such judgments and decrees rendered in the Circuit and District Courts as are by law liens upon real estate. (See opinion of Willson, J., in Ward vs. Chamberlain, Am. Law Register, of January, 1861, p. 177.)

If we are right in this proposition, it follows that the creditor in such a judgment as this is placed upon an unequal and less favored footing than a judgment creditor in the State courts.

It is also proper to observe that the sureties justify upon both their real and personal property.

5. There is no practice in the Admiralty in the nature of a creditor's bill, and the defendants may successfully avoid the collection of the judgment by investing their means in real estate, or by otherwise placing them beyond the reach of a *fieri facias*.

If then we cannot arrest the person of the sureties, the security given upon the release of the property arrested may in any case, and in fact in this case, will prove entirely worthless.

It may be said that similar objections exist as to the application of this rule to cases *in personam*. This, however, is rather theoretical than practical. The proceeding *in personam* in the Admiralty is rare, as the State Courts in that character of actions have ample jurisdiction, while its doors are closed against the proceeding *in rem*.

But again, and here is the important distinction between the two classes of cases: The libellant *in rem* has a lien on the *res*, and he should not be deprived of it without some substitute of equal value. At any rate, it will not be done by this court upon doubtful, not to say unnecessary and uncalled-for, statutory construction.

6. In any view of the subject, Rule 48 should not apply to cases *in rem* sounding in tort. Had a suit been brought in the State Court against the owners of the "Kentucky" for this collision, it would have been in the form of an action in trespass or case, and the defendants would have been liable to arrest both on mesne and final process.

Code of Procedure, sections 179 and 288.

Had a libel *in personam* been filed in this court for the same

cause of action, the owners would have been liable to arrest, and *ca: sa:* would have been the proper execution against them and their sureties.

Rule of Sup. Court, No. 3.

The character of the action is not changed by being *in rem* If it be, the curious anomaly is presented of a party having *a lien* upon a vessel which he is entitled to enforce for his indemnification, attempting to do it and having his action (by the giving of a bond or stipulation under the statute) turned substantially into a proceeding *in personam* without the right to a *ca: sa:* to enforce the decree; thus making his libel *in rem* for a cause of collision of less real value than a libel *in personam* for the same cause.

The sureties are equally with the claimant subject to arrest on the *ca: sa.*

2 Conkling's Adm., 433.

This is in accordance wit1 the ancient Admiralty practice.

Sec. 2 Brown's Civ. and Adm. Law, 409.

Lane vs. Townsend, Ware's Rep., 299.

HENRY W. ROGERS,
Of Counsel for Plaintiff in Error.

LUCIUS H. PRATT,
vs.
THE PROPELLER KENTUCKY.

NELSON, C. J.

This is a motion on the part of the libellant and appellee, Pratt, to discharge an order granted by me, at Chambers, on the 26th of August, 1859, discharging the stipulators or sureties from imprisonment. The libellants had obtained a decree in the District Court in a case of collision, for the sum of $19,427 75, from which an appeal was taken to this court, and the decree affirmed. The usual decree had been entered in the court below against the claimants, and also against the sureties. After affirmance in this court, execution was issued against the goods and chattels, lands and

tenements of the claimants, and also against the sureties, with a clause directing the arrest and imprisonment of the sureties in case of default in making the amount of the decree out of the property; and, in pursuance thereof, the sureties were arrested and imprisoned in the jail of the county of Oswego. The question in the case is, whether or not the sureties were liable to imprisonment under the laws of Congress. The act of 1839 (5 U. S. L., 321), provides "that no person shall be imprisoned for debt in any State, on process issuing out of a court of the United States, where, by the laws of such State, imprisonment for debt has been abolished," &c. And by the act of 1841, (ib. 410,) it is provided that the above act "shall be so construed as to abolish imprisonment for debt on process issuing out of any court of the United States, *in all cases whatever*, when by the laws of the State in which the said Court shall be held, imprisonment for debt has been, or shall hereafter be abolished." By the act of 1831, the State of New York abolished imprisonment for debt on execution upon any judgment or decree, founded upon contract, which is the character of the decree against the sureties in the present case.

It is insisted, however, that the acts of Congress of 1839 and 1841, have been modified by the 21st rule in Admiralty, adopted at the December Term of the Supreme Court of the United States, 1845, which, in terms, gives to the libellant the right to arrest the body of the defendant on execution. This rule was adopted under the authority conferred upon the Court by the act of Congress passed August 23d, 1842, § 6.

It is not material in the question before us, to determine whether or not this rule was within the power thus conferred upon the Court, but we think it proper to say, that the general understanding of that act has been, that the Court had no power to repeal or modify any regulation of Congress, existing on the subjects there referred to.

It is true that some of the District Judges took a different view of the act of 1842, and expressed opinions that imprisonment for debt in admiralty still existed by virtue of that rule, and which led to its modification by rule 48, adopted December Term, 1850, and which in direct terms conforms the practice to the acts of 1839 and 1841. Since the adoption of this rule, so far as we know or believe, there has been no imprisonment for debt upon execution in admiralty in this State.

The rule 48 was drawn with great care, and with the express purpose of conforming the practice in suits sounding in contract in the District Court in Admiralty, as to the arrest and imprisoument of the person of the de-

fendant, with that of the State in like analogous cases. Hence the rule declares, that imprisonment for debt shall be abolished in all cases where, by the laws of the State, it has been or shall be abolished, "upon similar or analagous process issuing from a State court." That is, if a defendant in the State courts is exempt from personal arrest and imprisonment on all process, whether mesne or final, in cases sounding in contract, then the defendant in admiralty in all such cases will be in like manner exempt.

It was suggested on the argument, that the real estate of the sureties was not subject to the execution in admiralty: but this is clearly a misapprehension, as the practice is otherwise, and the liens of judgment and decree in the federal courts are regulated by act of Congress. (Act of July 4th, 1840.)

We have never entertained a doubt upon this question since the adoption of the rule 48, in December Term, 1850, and indeed, if it had come before me previous to that rule, we would have held that the 21st rule in admiralty should be construed as qualified by the acts of 1839 and 1841. Without pursuing the question in the case further, we are satisfied the sureties were entitled to their discharge, and that the motion should be denied. If we had entertained a doubt upon the question, or regarded it as new, we should not have granted the discharge without requiring notice to the proctors for the libellant, but having a settled conviction that the proceeding was unwarranted, we deemed it right to act in the matter without further delay. As the summary disposition of the motion, however, deprived the libellant from a review of the question in the Appellate Court, we shall direct that the record be made up in form by his proctors if they desire, so as to present the question *as decided upon the return to a writ of habeas corpus, embodying the facts as set forth in the affidavit and schedule upon which the motion was granted:* and inasmuch as the question had not been adjudicated, and different opinions had been expressed in the District Court, and, indeed, in the Circuit Court of the United States for the first circuit, we shall modify the order granting the discharge, so as to forbid any suit against the libellant, proctors or marshal for the illegal arrest and imprisonment.

Let the rule be entered by the clerk in conformity with the above directions.

"Filed Sept. 1, 1860. (A copy.) Witness my hand and official seal, this 1st day of Sept., A, D. 1860.

[L. S.] A. A. BOYCE, Clerk.